

Pre-Authorization Decision
Document for Private Settlers

Army Creek Landfill Superfund Site
New Castle County
Delaware

Re: Army Creek Landfill Site
Ref: CERCLA 90-003

DECISION DOCUMENT

PREAUTHORIZATION OF A CERCLA §111(a) CLAIM

ARMY CREEK LANDFILL SITE - NEW CASTLE COUNTY, DELAWARE

STATEMENT OF AUTHORITY

Section 111 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") authorizes the reimbursement of response costs incurred in carrying out the National Contingency Plan ("NCP"), 40 CFR Part 300. Section 112 of CERCLA directs the President to establish the forms and procedures for filing claims against the Hazardous Substance Superfund ("the Superfund" or "the Fund"). Executive Order 12580 delegates to the Administrator of the Environmental Protection Agency ("EPA") the responsibility for such claims. Executive Order 12580 also delegates to the EPA Administrator the authority to reach settlements pursuant to section 122(b) of CERCLA. The Director, Office of Emergency and Remedial Response ("Director, OERR") is delegated authority to evaluate and make determinations regarding claims (EPA Delegation 14-9, September 13, 1987, and EPA Redlegation R-14-9 "Claims Asserted Against the Fund," May 25, 1988).

BACKGROUND ON THE SITE

On September 30, 1986, James M. Seif, EPA Regional Administrator for Region III, signed the first Record of Decision ("ROD-1") for the Army Creek Landfill Site (hereinafter referred to as the "Site" or "Army Creek Site"). ROD-1 calls for the health and environmental threats posed by the Site to be addressed by means of installation of a surface cap, gas venting system, appropriate erosion and sediment controls, and pumping of groundwater. These activities with the exception of pumping of groundwater are collectively referred to in the Consent Decree being executed simultaneously with this Preauthorization Decision Document (PDD) as "Work-1." The activities collectively referred to in the Consent Decree as "Work-1" are the subject of this PDD.

On June 29, 1990, Edwin B. Erickson, EPA Regional Administrator for Region III, signed a second Record of Decision ("ROD-2") for the Army Creek Site. ROD-2 calls for the health and environmental threats posed by the Site to be addressed by means of a groundwater pumping and treatment system design to treat the groundwater underlying the Site and the adjacent Delaware Sand and Gravel Site. The activities collectively referred to as Work-2 are

the subject of a separate PDD, which is attached to the Consent Decree, and are not covered by this PDD.

In February 1989, EPA, pursuant to section 106(a) of CERCLA, issued notice letters to a number of potentially responsible parties ("PRPs"). Discussions between EPA and the PRPs aimed at settlement of the case resulted in an agreement in principle between EPA and a number of the PRPs in September 1989. This agreement provides that the Private Settlers, a number of PRPs who are proposed settlers, as defined in the Consent Decree, shall implement the remedial activities of Work-1, including operation and maintenance, at the Site in compliance with the Consent Decree. EPA agreed to reimburse the Private Settlers ten percent of necessary response costs incurred in carrying out Work-1, excluding the costs of operation and maintenance. The agreement also provided that New Castle County, the remaining PRP who is a proposed settlor (hereinafter referred to as "the County"), will carry out Work-2 and that EPA will reimburse the County forty percent of necessary response costs. As stated above, this PDD addresses only Work-1 and the reimbursement of the Private Settlers.

The allocation of remedial tasks between the Private Settlers and the County is made solely for the purpose of presenting claims against the Fund. Notwithstanding such allocation of remedial tasks, the Settlers are jointly and severally liable for obligations imposed by the Consent Decree.

On August 13, 1990, the Private Settlers submitted a formal Application for Preauthorization as required by section 300.700(d) of the NCP.

The Scope of Work, which is appended to the Consent Decree, will be used to implement ROD-1 as summarized above.

FINDINGS

Preauthorization (i.e., EPA's prior approval to submit a claim against the Superfund for reasonable and necessary response costs incurred as a result of carrying out the NCP) represents the Agency's commitment that if the response action is conducted in accordance with the preauthorization, the Consent Decree, CERCLA and the NCP, and costs are reasonable and necessary, reimbursement, subject to any maximum amount of money set forth in the Preauthorization Decision Document, will be had from the Superfund. Preauthorization is a discretionary action by the Agency.

EPA has determined, based on its evaluation of relevant documents and the Private Settlers' Application for Preauthorization, pursuant to section 300.700(d) of the NCP, that:

- (1) A release or potential release of hazardous substances

warranting a response under section 300.435 of the NCP exists at the Army Creek Site;

- (2) The Private Settlers have agreed to implement the cost-effective remedy selected by EPA to address the threat posed by the release at the Site;
- (3) The Private Settlers have demonstrated engineering expertise and a knowledge of the NCP and attendant guidance;
- (4) The activities proposed by the Private Settlers, when supplemented by the terms and conditions contained herein, are consistent with the NCP; and
- (5) The Private Settlers have demonstrated efforts to obtain the cooperation of the State of Delaware.

While EPA does not accept as fact all of the statements contained in the Private Settlor's Application for Preauthorization, the Application demonstrates a knowledge of relevant NCP provisions and EPA guidance for the conduct of a remedial action. The Consent Decree, including the terms and conditions specified in the Preauthorization Decision Document, the RODs, and the Scope of Work shall govern the conduct of the remedial action. In the event of any ambiguity or inconsistency between the Application for Preauthorization and this Preauthorization Decision Document with regard to claims against the Fund, the Preauthorization Decision Document and the Consent Decree shall govern.

DECISION AND TERMS AND CONDITIONS

I preauthorize the Private Settlers to submit a claim(s) against the Superfund for an amount not to exceed the lesser of one million nine hundred and seventy six thousand dollars (\$1,976,000), or ten percent (10%) of reasonable and necessary eligible costs, unless such amount is adjusted by EPA pursuant to paragraph 14 below, incurred for completion of the design and construction of the remedy set forth in EPA's Record of Decision for the Army Creek Site (Exhibit 1 hereto) as specified in the Scope of Work (which is incorporated into the Consent Decree) and the Work Plans when approved by EPA (hereinafter referred to as Work-1), subject to the terms and conditions set forth below. In the event of any ambiguity or inconsistency between the terms and conditions and the Discussion (which follows some of the terms and conditions), the terms and conditions shall govern.

- 1) The Private Settlers, as provided in Section VII. (Implementation of Work) of the Consent Decree, shall develop Work Plans for Work-1. Such Work Plans shall include provision for the development and implementation of a worker health and safety plan. The Health and Safety Plan shall

comply with OSHA Safety and Health Standards: Hazardous Waste Operations and Emergency Response (29 CFR Part 1910.120; 54 Federal Register 9294 et seq., March 6, 1989).

Discussion:

As a part of the Health and Safety Plan, the Private Settlers will develop a Spill/Volatile Emissions Contingency Plan to address the protection of area residents from the physical, chemical and/or biological hazards particular to the Site and the selected remedial action. In addition, Private Settlers shall develop an air monitoring plan for the Site during the remedial action. In accordance with the Consent Decree and Scope of Work, Private Settlers will implement Work Plans as approved by EPA.

- 2) Private Settlers shall undertake Work-1 in accordance with the requirements of all "applicable" or "relevant and appropriate" Federal and State environmental laws, regulations and requirements as identified pursuant to the Consent Decree and pursuant to section 121 of CERCLA. All activities undertaken by Private Settlers off-site shall, in addition, comply with all applicable permit requirements, unless an exemption from the requirements of such permits is granted according to law.
- 3) Modification of remedial design elements contained in EPA's Final Design Report, the performance standards specified in Section VI.C (Work To Be Performed) of the Consent Decree, or the Scope of Work, shall require approval by the EPA Regional Administrator or his/her designee. Such modifications, when approved in accordance with Agency procedures by the Regional Administrator, shall modify this decision document.
- 4) Private Settlers, pursuant to Section VI. (Work To Be Performed) of the Consent Decree, shall provide for long-term site management (i.e., operation and maintenance) of the Site sufficient to ensure the long-term effectiveness and permanence of Work-1. The costs of operation and maintenance, unlike the costs to determine that the remedy is functional (i.e., "shakedown costs"), are not eligible for reimbursement.
- 5) Private Settlers shall develop and implement for Work-1:
 - a) Procedures which provide adequate public notice of solicitations for offers or bids on contracts. Solicitations must include the evaluation methods and the criteria for contractor selection. Pursuant to Section VI.A (Work To Be Performed) of the Consent Decree, Private Settlers shall notify EPA of the qualifications of any contractor or subcontractor. EPA shall have the right to disapprove the selection of the architect or engineer and

the construction firm(s) selected by Private Settlers. The reasons for any such disapproval shall be communicated to Private Settlers in writing.

Discussion:

The Private Settlers' Application for Preauthorization states that EPA will review bid proposals and may instruct the Private Settlers to remove a particular bid proposal from consideration. While the Consent Decree provides that EPA may disapprove a contractor based on technical qualification, it is unlikely that EPA will so instruct the Private Settlers. When soliciting bids or proposals, Private Settlers shall give adequate (generally 30 days before receipt of bids or proposals) public notice in professional journals, newspapers, or publications of general circulation over a reasonable area.

- b) Procedures for procurement transactions which: provide maximum open and free competition; do not unduly restrict or eliminate competition; and provide for the award of contracts to the lowest, responsive, responsible bidder, when the selection can be made principally on the basis of price. Private Settlers and their contractors shall use free and open competition in the procurement of supplies, services and construction.

Discussion:

While Private Settlers are not required to comply with the Federal procurement requirements found at 40 CFR Part 33 or EPA's Guidance on State Procurement Under Remedial Cooperative Agreements (OSWER Directive 9375.1-11, June 1988), they should be guided by these documents in the development of procurement procedures for small purchases, formal advertising, competitive negotiations and noncompetitive negotiations as each may be appropriate to remedying the release or threat of release at the Site. Small purchase procedures are those relatively simple, informal procurement methods for securing services, supplies and other property from an adequate number of qualified sources when the services, supplies and other property being purchased constitute a discrete procurement transaction and do not cost more than \$25,000 in the aggregate. Private Settlers shall not divide procurement transactions into smaller parts to avoid the dollar limitation. The award of any fixed price contract by Private Settlers satisfies the requirement of open and free competition for any subcontracts awarded within the scope of the prime contract.

- c) A prequalified list(s) of persons, firms, or products for use in acquiring goods and services, if appropriate. Such list(s) must be current and include enough qualified sources to ensure maximum open and free competition. Private Settlers should not preclude potential offerors who are not on the prequalified list from qualifying during the solicitation period.
- d) Fixed-price contracts for construction which include a Differing Site Conditions clause equivalent to that found at 40 CFR §33.1030(4) (1987).

Discussion:

The Private Settlers' Application for Preauthorization states that contracts will include a differing sites conditions that "generally is in accord" with the above stated requirement. The Private Settlers shall include in all fixed-price contracts for construction a provision equivalent to that found at 40 CFR §33.1030(4) (1987).

- e) Procedures to settle and satisfactorily resolve, in accordance with sound business judgment and good administrative practice, all contractual and administrative issues arising out of preauthorized actions. Private Settlers shall issue invitations for bids or requests for proposals; select contractors; approve subcontractors; manage contracts in a manner to minimize change orders and contractor claims; resolve protests, claims, and other procurement related disputes; and handle subcontracts to assure that work is performed in accordance with terms, conditions and specifications of contracts.
- f) A change order management policy and procedure generally in accordance with EPA's guidance on State Procurement Under Remedial Cooperative Agreements (OSWER Directive 9375.1-11, June 1988).
- g) Detailed data quality assurance/quality control plans for sample collection and analysis activities (e.g., sampling, treatability studies, monitoring) in accordance with Section XII. (Data Quality Assurance) of the Consent Decree.
- h) A financial management system that consistently applies generally accepted accounting principles and practices and includes an accurate, current and complete accounting of all financial transactions for the project, complete with supporting documents, and a systematic method to resolve audit findings and recommendations.

- 6). Pursuant to Section XI. (Designated Remedial Project Manager and Project Coordinators) of the Consent Decree, Private Settlers shall notify EPA of their selection of the Project Coordinator who shall be responsible for overseeing and administering the cleanup. As a term and condition of preauthorization, EPA shall have the right to disapprove the Project Coordinator selected by Private Settlers. The reason(s) for any such disapproval shall be communicated to Private Settlers in writing. In addition, the Private Settlers shall, as soon as practicable following the date of entry of the Consent Decree, supply EPA with a Management Plan including an organization and function chart identifying the responsibilities of and relationship between individuals responsible for the management of Work-1 (e.g., Private Settlers' Committee, Project Coordinator, Trustee, Construction Manager, Independent Quality Assurance Team, Contractors, Subcontractors).

Discussion:

The Private Settlers' Application for Preauthorization did not contain a detailed Management Plan for the response action. As a term and condition of preauthorization, the Private Settlers shall satisfy the above requirement. The Management Plan shall be submitted to EPA concurrent with the Work Plan under the schedule specified in Section VII. (Implementation Of Work) of the Consent Decree.

- 7) In order to provide for construction management for the Site, Private Settlers may utilize the competitive negotiation procurement method for award of the contract for architectural and engineering ("A&E") services. Private Settlers may award a cost reimbursement contract for A&E services and that contract may include an upper limit on costs.

Discussion:

Other professional services which do not constitute construction may also be procured utilizing the small purchase procurement, competitive negotiation, or noncompetitive procurement methods.

- 8) In order to implement construction of Work-1 at the Site, Private Settlers shall utilize the formal advertising (sealed bidding) method of procurement and shall award a fixed price contract (i.e., unit price, lump sum, or combination of lump sum and unit price) to the lowest responsive, responsible bidder for construction. The prior approval of the Regional Administrator or his/her designee is required in order for Private Settlers to use a procurement method other than the formal advertising method.

Discussion:

Private Settlers' Application for Preauthorization did not clearly propose the type of contract to be used for construction management or independent quality assurance. In addition, it is unclear whether individual contracts will be awarded by the Private Settlers' Committee, the Trustee or the construction management firm. EPA concludes, based on its procedures to ensure reasonable costs and the spirit of the procurement principles, that a cost reimbursement is the appropriate form of contract for A&E services and that a fixed-price contract(s) is most appropriate for construction. If Private Settlers elect to award a prime contract for A&E and construction, price competition shall occur at the subcontractor level.

- 9) Private Settlers shall provide EPA and its employees, contractors and agents with Site access as set forth in Section XIII. (Site Access) of the Consent Decree and shall immediately notify the Agency if they are unable to initiate or complete the preauthorized remedial action.
- 10) In submitting claims to the Superfund, Private Settlers shall:
 - a) Document that response activities were preauthorized by EPA;
 - b) Substantiate all claimed costs through a financial management system as described in paragraph 5(h); and
 - c) Document that all claimed costs were eligible for reimbursement pursuant to this preauthorization and are reasonable and necessary in accordance with the appropriate Federal cost principles.

Discussion:

See paragraph 16 for additional references to the Federal cost principles.

- 11) Private Settlers shall maintain all cost documentation and any records relating to their claim for a period of not less than ten years from the date on which the final claim has been submitted to the Superfund, and shall provide EPA with access to their records. At the end of the ten-year period, Private Settlers shall notify EPA of the location of all records. Private Settlers shall allow EPA the opportunity to take possession of the records before they are destroyed. This requirement is in addition to the record preservation requirement located at Section XV. (Record Preservation) of the Consent Decree.

- 12) Claims may be submitted against the Superfund by Private Settlers only while they are in compliance with the terms of the Consent Decree and no more frequently than intervals of:
 - a) Project start-up through completion of clearing and brushing of Lobe 1;
 - b) Completion of foundation fill placement for Lobe 1;
 - c) Completion of cap construction for Lobe 1;
 - d) Completion of foundation fill placement for Lobe 2;
 - e) Completion of cap construction for Lobe 2;
 - f) Completion of Site vegetation, fence construction, demobilization and closeout; and
 - g) Remaining eligible costs following EPA issuance of the Certificate of Completion for the construction phase of Work-1.

Discussion:

Claims submitted by the Private Settlers may include the costs incurred for A&E or other professional services rendered prior to the completion of each milestone in the above schedule. The Private Settlers may not submit claims more frequently than at six month intervals, nor, with the exception of the final claim, for amounts less than \$250,000.

- 13) Payment of a claim for work completed does not constitute acceptance of the work performed. EPA will determine the acceptability of work performed in accordance with the Consent Decree.
- 14) Pursuant to Section XXII. (Claims Against The Fund And Payment of Response Costs) of the Consent Decree, if Private Settlers find it necessary to seek to modify the actions that EPA preauthorized, or if it becomes apparent that the project's costs will exceed the approved costs as set out herein, or if the Private Settlers undertake additional work approved by EPA pursuant to the provisions of the Consent Decree, Private Settlers may submit to EPA a revised Application for Preauthorization. EPA will consider such an Application for Preauthorization and will, if appropriate, subject to the availability of appropriated funds, amend the maximum dollar amount for which Private Settlers may submit claims to the Fund. The maximum amount for which Private Settlers may submit claims will be determined according to the criteria used in approving Private Settlers' Application for Preauthorization.

- 15) Claims shall be submitted to the Director, Office of Emergency and Remedial Response, EPA, Washington, D.C. 20460. EPA shall provide the appropriate form(s) for such claims.
- 16) Prior to the payment of any claim, EPA may adjust claims using the facilities and services of private insurance and claims adjusting organizations or Federal personnel. In making a determination whether costs are allowable, the claims adjuster will rely upon the appropriate Federal cost principles (non-profit organizations - OMB Circular A-122; States and political subdivisions - OMB Circular A-87; profit making organizations - 48 CFR Subparts 31.1 and 31-2). When additional costs are incurred due to acts or omissions by the Private Settlers, payment of the claim will be adjusted accordingly. EPA may require Private Settlers to submit any additional information needed to determine whether the actions taken were reasonable and necessary.
- 17) At least 60 days before filing a claim against the Fund for Work-1, Private Settlers shall present in writing all claims to any person known to them who may be liable under section 107 of CERCLA for response costs incurred in carrying out the Consent Decree. If the first claim was denied by the responsible party or not responded to, and EPA agrees that there is no reason to believe that subsequent claims would be honored by such a responsible party, the denial of the first claim, or lack of response, shall be considered denial of every subsequent claim.
- 18) Payment of any claim shall be subject to the Private Settlers subrogating to the United States the rights of the Private Settlers to the extent to which their response costs are compensated from the Superfund. Further, Private Settlers and their contractors shall assist in any cost recovery action which may be initiated by the United States by furnishing personnel, services, documents, and materials needed to assist EPA in the collection of evidence to document work performed and costs expended by Private Settlers or Private Settlers' contractors at the Site; providing all requested assistance in the interpretation of evidence and costs and providing requested testimony. All of Private Settlers' contracts that implement preauthorized activities shall include a specific requirement that their contractors agree to provide this cost recovery assistance.
- 19) Pursuant to section 111(a)(2) of CERCLA, eligible costs are those costs incurred, consistent with the NCP, in carrying out the Work-1, subject to the following limitations:
 - a) Costs may be reimbursed only if incurred after the date of this preauthorization;

- b) Costs may be reimbursed only for completion of the design and construction of the remedy, including costs to determine that the remedy is functional, for the Site as provided herein. Such costs shall not include any of the oversight costs incurred by EPA, nor costs that were incurred by EPA prior to the effective date of the Consent Decree.
- c) Costs incurred for long-term operation and maintenance, as described in paragraph 4, are not eligible for reimbursement from the Superfund.
- d) Costs incurred for the payment of a person who is included in the List of Parties Excluded From Federal Procurement or Non-Procurement, established pursuant to Executive Order 12549, May 26, 1988, at the time the contract is awarded shall not be eligible for reimbursement, unless Private Settlers obtain approval from EPA, pursuant to 40 CFR Part 32, prior to incurring the obligation.
- e) Costs incurred for the payment of contractor claims either through settlement of such claims or an award by a third party may be reimbursed from the Fund to the extent EPA determines that:
 - (i) the contractor claim arose from work within the scope of the contract at issue and the contract was for activities which were preauthorized;
 - (ii) the contractor claim is meritorious;
 - (iii) the contractor claim was not caused by the mismanagement of Private Settlers;
 - (iv) the contractor claim was not caused by Private Settlers' vicarious liability for the improper actions of others;
 - (v) the claimed amount is reasonable and necessary;
 - (vi) the claim for such costs is filed by Private Settlers within 5 years of completion of the preauthorized activities; and
 - (vii) payment of such a claim will not result in total payments from the Fund in excess of the amount preauthorized.

Discussion:

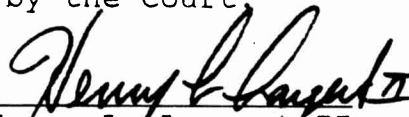
"Contractor claim" means the disputed portion of a written demand or written assertion by any contractor who has contracted with Private Settlers pursuant to the Consent

Decree to perform Work-1, seeking as a matter of right, the payment of money, adjustment, or interpretation of contract terms, or other relief, arising under or related to a contract, which has been finally rejected or not acted upon by Private Settlers, or an award by a Third Party through the Disputes Clause of the contract document.

- f) An award by a third party on a contractor claim should include:
 - (i) findings of fact;
 - (ii) conclusions of law;
 - (iii) allocation of responsibility for each issue;
 - (iv) basis for the amount of award; and
 - (v) the rationale for the decision.
- g) Interest accrues on amounts due Private Settlers pursuant to this agreement where EPA fails to pay the amount within sixty (60) days of EPA's receipt of a completed claim from Private Settlers. A completed claim is a demand for a sum certain which includes all documentation required by EPA to substantiate the appropriateness of the amounts claimed. Where Private Settlers submit a claim which is technically complete but for which EPA requires additional information in order to evaluate the amount claimed, interest will not accrue on the claim until sixty (60) days after EPA's receipt of the requested additional information. The rate of interest paid on a claim is the rate of interest on investments of the Superfund established by subchapter A of chapter 98 of the Internal Revenue Code of 1954.
- 20) This Preauthorization Decision Document is intended to benefit only the Private Settlers and EPA. It extends no benefit to nor creates any right in any third party.
- 21) If any material statement or representation made in the Application for Preauthorization is false, misleading, misrepresented, or misstated, and EPA relied upon such statement in making its decision, the preauthorization by EPA may be withdrawn following written notice to Private Settlers. Disputes arising out of EPA's determination to withdraw its preauthorization shall be governed by Section XVIII. (Dispute Resolution) of the Consent Decree. Criminal and other penalties may apply (see Exhibit 3).
- 22) The Superfund is not hereby obligated to reimburse Private Settlers for subsequent remedial actions not covered by this preauthorization caused by failure of the original remedy, if those actions are necessary as a result of the failure of

Private Settlers, their employees or agents, or any third party having a contractual relationship with Private Settlers to properly perform activities under the Consent Decree and Scope of Work and any modification thereto approved by EPA and in conformance with the terms and conditions of this Preauthorization Decision Document. The foregoing shall not apply if the remedy fails for any other reason. EPA may require Private Settlers to submit any additional information needed to determine whether the actions taken were in conformance with the Consent Decree and the Scope of Work, and were reasonable and necessary.

- 23) This preauthorization shall be effective as of the date of execution. Reimbursement from the Fund shall be contingent upon: (1) EPA's approval in writing of the performance of specific response activities to be initiated prior to the date of entry of the Consent Decree, and (2) entry of the Consent Decree by the Court.


Henry L. Longest II
Director, Office of
Emergency & Remedial
Response

9/27/90
Date

EXHIBITS

1. EPA Records of Decision for the Army Creek Landfill Site
2. Consent Decree
3. Civil and Criminal Penalties

EXHIBIT 3

CERCLA PENALTY FOR PRESENTING FRAUDULENT CLAIM

Any person who knowingly gives or causes to be given false information as a part of a claim against the Hazardous Substance Superfund may, upon conviction, be fined in accordance with the applicable provisions of title 18 of the United States Code or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. (42 USC 9612(b)(1).)

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant is liable to the United States for a civil penalty of \$2,000, and in an amount equal to two times the amount of damages sustained by the Government because of the acts of that person, and costs of the civil action. (31 USC 3729 and 3730.)

CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

The claimant will be charged a maximum fine of not more than \$10,000 or be imprisoned for a maximum of 5 years, or both. (See 62 Stat. 698, 749; 18 USC 287, 1001.)